1422.

SUPREME COURT OF THE UNITED STATES.

No. 81.

LESSEE OF DANIEL W. GANTLY AND AL., PLAINTIFF,

VS.

WILLIAM G. AND GEORGE W. EWING.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. FOR INDIANA.

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J. & G. S. GIDEON, printers.

Be it known that, among the records and proceedings of the circuit court of the United States for the seventh judicial circuit and district of Indiana, is the following, to wit:

Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, began and held at Indianapolis, in said district, on Monday, the fifteenth day of May, one thousand eight hundred and forty-three, before the honorable John McLean, one of the justices of the Supreme Court of the United States, and the honorable Elisha M. Huntington, district judge of the United States for the district of Indiana.

JOHN DOE ex dem. Daniel W. Gantly, et al.
vs.
RICHARD ROE. } Ejectment.

Be it remembered that, heretofore, to wit, on the seventeenth day of May, A. D. one thousand eight hundred and forty-two, come the plaintiff, by his attorney, Henry Cooper, esquire, and filed his certain declaration herein in writing, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *district of Indiana:*

In the circuit court of the United States for the district of Indiana, May term, A. D. eighteen hundred and forty-two.

INDIANA, *to wit:*

Richard Roe, a resident citizen of the State and district of Indiana, was attached to answer John Doe, a resident citizen of the State and district of New York, of a plea, wherefore the said Richard Roe, with force and arms, &c., entered into one messuage, barns, stables, out-houses, yards, gardens, one half acre, more or less, of arable land, known as lot number one hundred and seventy-nine in the town of Peru, on the original plat of the same, situate in the county of Miami, in the district and State of Indiana aforesaid, with the appurtenances, which Daniel W. Gantly, a resident citizen of the district and State of New York, had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe then and there did; he, the said John Doe, and he, the said Daniel W. Gantly, both then. and still being, resident citizens of the said district and State of New York, and the said Richard Roe then, and still being, a resident citizens of the district and State of Indiana.

And the said plaintiff avers that the said premises were of the value of six hundred dollars, to the damage of the said John Doe, and against the peace and dignity of the United States.

And thereupon the said John Doe, by Henry Cooper, his attorney, complains that the said Daniel W. Gantley heretofore, to wit,

on the first day of October, in the year of our Lord one thousand eight hundred and forty, at Peru, in the district and State of Indiana aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe and his assigns, from the said first day of October, in the year eighteen hundred and forty, for and during, and until the full end and term of, ten years from thence next ensuing, fully to be completed and ended; by virtue of which said demise the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him granted as aforesaid; and the said John Doe being so thereof possessed as aforesaid, the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms entered into the said tenements, with the appurtenances, which the said Daniel W. Gantly had demised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of the United States; wherefore the said John Doe says he is injured, and has sustained damage, to the value of five hundred dollars.

And also that the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms entered into one undivided moiety or half part, the whole into two equal moieties to be divided, of, and in, and to the following other messuage, barns, stables, out-houses, yards, gardens, one half acre, more or less, arable land, known as lot number one hundred and seventy-nine, in the town of Peru, on the original plat of the same, situate in the county of Miami, in the district and State of Indiana aforesaid, with the appurtenances, which Henry Laverty, a resident citizen of the said State and district of New York, had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of the United States.

And thereupon the said John Doe, by Henry Cooper, his said attorney, complains, that whereas the said Henry Laverty, heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and forty, at Peru, in the State and district of Indiana aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe and his assigns, from the first day of October, in the year of our Lord one thousand eight hundred and forty last past, for and during, and unto the full end and term of, ten years from thence next ensuing, and fully to be completed and ended; by virtue of the said demise the said John Doe entered into the said tenements, with the appurtenances, and became, and was thereof possessed for the said term so to him thereof granted.

And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, entered into the said tenements, with the appurtenances, which the said Henry Laverty had demised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to said John Doe then and there did, to the great damage of the said John Doe, and against the peace of the United States. And the said John Doe avers that, at and from the time of the said demise, he, the said Henry Laverty, and he the said John Doe, then both were, and still are, and have ever since been, resident citizens of the said district and State of New York; and the said Richard Roe then was, and has ever since been, a resident citizen of the said district and State of Indiana. And the said plaintiff further avers, that the said tenements are of the value of five hundred dollars; wherefore the said John Doe says he is injured, and has sustained damage to the value of five hundred dollars.

And also the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms entered into the other one undivided moiety or half part, the whole into two equal moieties to be divided of, in, and to, the following other messuage, barns, stables, out-houses, gardens, one half acre, more or less, arable land, known as lot number one hundred and seventy nine, in the town of Peru, on the original plat of the same, situate in the county of Miami, in the district and State of Indiana aforesaid, which Anthony V. Winans, a resident citizen of the said district and State of New York, had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of the United States.

And thereupon the said John Doe, by Henry Cooper, his attorney, complains, that whereas the said Anthony V. Winans heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and forty, at Peru, in the district and State of Indiana aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the first day of October, in the year of our Lord one thousand eight hundred and forty last past, for, and during, and until, the full end and term of ten years then next ensuing, to be fully completed and ended; by virtue of said demise the said John Doe entered into the said tenements, with the appurtenances, and became, and was thereof possessed, for the said term so to him thereof granted. And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, entered into the said tenements, with the

appurtenances, which the said Anthony V. Winans had devised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of the United States.

And the said John Doe avers that, at and from the time of the said demise, he, the said Anthony V. Winans, and he the said John Doe, then both were, and still are, and have ever since been, resident citizens of the said district and State of New York, and that the said Richard Roe then was, and has ever since been, a resident citizen of the said district and State of Indiana.

And the said plaintiff further avers, that the said tenements are of the value of five hundred dollars; wherefore the said John Doe says he is injured, and has sustained damages, to the value of five hundred dollars.

And also that the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms entered into one other messuage, barns, stables, out-houses, yards, gardens, one half acre of arable land, with the appurtenances, being known as town lot number one hundred and seventy-nine, in the town of Peru, on the original plat of the same, situate in the county of Miami, in the district and State of Indiana aforesaid, which Henry Laverty and Anthony V. Winans, resident citizens of the said district and State of New York, had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of him the said John Doe, and against the peace of the United States.

And thereupon the said John Doe, by Henry Cooper, his attorney, complains, that whereas the said Henry Laverty and Anthony V. Winans, as assignees of the remaining debts, and estate, and effects, of one Daniel W. Gantly, an insolvent debtor, who also being a resident citizen of the said district and State of New York, duly appointed in pursuance of the statute of New York concerning insolvent debtors, in such case made and provided; which is in substance, and to the effect following:

"Such assignment shall vest in the assignees all the interest of such insolvent, at the time of executing of the same in any estate or property, real or personal, whether such interest be legal or equitable; but no contingent interest shall pass to the assignees by virtue of such assignment, unless the same shall become vested within three years after making the assignment; and in case of its becoming so vested, it shall pass to the assignees in the same manner as it would have vested in such insolvent, if no assignment had been made."

And the said Henry Laverty, and the said Anthony V. Winans,

having heretofore been appointed assignees of the debts and the estate of the said Dan'l W. Gantly, remaining unsettled, undisposed of, and not applied by the said Dan'l W. Gantly before the assignment; by virtue of which assignment the said Henry Laveity and Anthony V. Winans, as such assignees as aforesaid, heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and forty, at Peru, in the district and State of Indiana, had demised the said tenements and appurtenances to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the first day of October, in the year of our Lord one thousand eight hundred and forty last past, for and during the full end and term of ten years then next ensuing to be completed and ended.

By virtue of said demise the said John Doe entered into the said tenements, and became, and was thereof possessed for the said term so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, entered into the said tenements, with the appurtenances, which the said Henry Laverty and Anthony V. Winans had demised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of him the said John Doe, and against the peace of the United States.

And the said John Doe avers that, at and from the time of the said demise, the said Henry Laverty, Anthony V. Winans, Daniel W. Gantly, and the said John Doe, then all were, and still are, and have ever since been, resident citizens of the said district and State of New York, and that the said Richard Roe then was, and has ever since been, a resident citizen of the said district of Indiana.

And the said plaintiff further avers, that the said tenements are of the value of five hundred dollars; wherefore the said John Doe says he is injured, and has sustained damage, to the value of five hundred dollars, and therefore he brings his suit, &c.

HENRY COOPER,
Plaintiffs' att'y.

Mr. Richard L. Britton: I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or some part thereof, and I being sued in this action as casual ejector only, and having no claim or title to the same, do advise you to appear on the first day of the next term of the circuit court of the United States for the district of Indiana, to be holden at the State-house in Indianapolis, in and for said district, on the third Monday in November next, by some attorney of that court, and then and there, by the rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer

judgment therein to be entered against me by default, and you will be turned out of possession.

Yours, &c.

RICHARD ROE.

Upon which said declaration there was the following endorsement, to wit: I, James F. Hanna, deputy for Robert Hanna, marshal of the United States for the district of Indiana, do certify, that I served a copy of the within declaration in ejectment on Richard L. Britton, the defendant mentioned, and explained the notice thereof to him, and delivered him a true copy of the declaration and notice thereto underwritten.

JAMES F. HANNA, *Deputy*,
For ROBERT HANNA, *Mar. U. S. D. Ind.*

And afterwards, to wit, at a circuit court of the United States for the seventh circuit and district of Indiana, begun and holden at Indianapolis in said district, on Monday, the twenty-first day of November, in the year of our Lord one thousand eight hundred and forty-two, before the honorable Elisha M. Huntington, district judge of the United States for the district of Indiana aforesaid, come the said plaintiff, by his said attorney; and the defendant, by Fletcher Butler & Yandes, esqrs., his attorneys, comes also, and this cause is continued until to-morrow.

And afterwards, to wit, on Tuesday, the 22d day of November, aforesaid, that being the second judicial day of said term of said court, continued and holden at Indianapolis aforesaid, before the honorable judge aforesaid, come the said parties by their said attorneys; and it is ordered, by the consent of the attorneys for both parties, that William G. Ewing and George W. Ewing, resident citizens of the district and State of Indiana aforesaid, be made defendants in the stead of the now defendant Richard Roe, and do forthwith appear at the suit of the plaintiff, and receive a declaration in an action of trespass in ejectment for the premises in question; which said premises consists of town lot number one hundred and seventy-nine in the town of Peru, in the county of Miami, in the State and district of Indiana aforesaid, for which they entered as landlords to defend this action of trespass and ejectment.

And it is further ordered, by the like consent, that the said William G. Ewing and George W. Ewing do further plead not guilty thereto; and upon the trial of the issue, confess lease, entry, and ouster, and that they were, at the time of the service of the said declaration, in possession of the premises herein before mentioned and specified, and insist upon the title only; otherwise let judgment be entered for the plaintiff against the now defendant Richard Roe by default; and if, upon the trial of the said issue, the said William G. Ewing and George W. Ewing shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able to prosecute his writ against the said Richard Roe, then

no cost shall be allowed for not further prosecuting the same, but that the said William G. Ewing and George W. Ewing shall pay cost to the plaintiff, to be taxed by the court.

And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the said William G. Ewing and George W. Ewing, or it shall happen that the said plaintiff shall not further prosecute his said writ for any other cause than for not confessing lease, entry, and ouster, and possession as aforesaid, then the lessor of the plaintiff shall pay to said William G. Ewing and George W. Ewing costs to be adjudged; and this cause is continued until the thirtieth day of November, one thousand eight hundred and forty-two.

And afterwards, to wit, on Wednesday, the thirtieth day of November aforesaid, that being the ninth judicial day of said term of said court, continued and holden as aforesaid, come the said parties by their said attorneys, and on the affidavit and motion of said defendants this cause is continued until the next term of this court.

And afterwards, to wit, at a circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis in said district, before the honorable John McLean, one of the justices of the Supreme Court of the United States, and the honorable Elisha M. Huntington, district judge of the United States for the district of Indiana, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and forty-three, and continued to Tuesday, the sixteenth day of May, in the year aforesaid, when the parties by their said attorneys come; and the issue being joined here, now comes a jury, to wit, Joseph Mather, Alfred J. Cotton, Samuel Hizer, David G. Hanna, Benjamin F. Reeve, Alvan Blackledge, John F. Craft, Coker F. Clarkson, Douglass Maguire, John B. Dillon, Havilah Beardsly, and David G. Boardman, twelve good and lawful men of the district of Indiana aforesaid, who being elected, tried, and sworn, well and truly to try the issue joined, and a true verdict give according to the evidence, after hearing the evidence and the argument of counsel, and the charge of the court, return the following verdict:

"We, the jury, find for the defendant," and day is given.

And afterwards, to wit, on the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and forty-three, being the twelfth judicial day of the May term of said court, continued and holden as aforesaid, come the parties by their said attorney, and this cause coming on to be heard, and a jury being empannelled, to wit, the jury abovesaid, the following facts were proved:

"On the twenty-fifth day of December, eighteen hundred and thirty-eight, one Jacob Linzee was indebted to Daniel W. Gantly, of the city of New York, in the sum of nine hundred and nine dollars and eighty-two cents; and, to secure the payment of the same, Linzee then executed to Gantly a mortgage on town lot numbered one hundred and seventy-nine, in Peru, Indiana, of which Linzee

was seized in fee; at the time of the execution of the mortgage Linzee was in possession of the mortgaged premises, and they were worth from one thousand to fourteen hundred dollars. Linzee made default in the payment, and Gantly, on the eighth day of September, eighteen hundred and forty, obtained a decree in the State court to foreclose the mortgage; and, unless the money should be paid in sixty days, an execution was directed to be issued for the sale of the premises.

In January, eighteen hundred and forty-one, an execution was issued, and on the thirteenth of February following, before the sale of the property, the appraisement law passed, and was published the twenty-third day of February, eighteen hundred and forty-one; on the first of March, eighteen hundred and forty-one, the sheriff having given due notice, sold the premises at public auction to the defendants for seventy-six dollars, and executed a deed to them for the same; which deed was offered in evidence to support the title of the defendants. The property was not valued, nor were the rents and profits offered for sale by the sheriff. And the court were asked to instruct the jury that, as the rents and profits had not been offered, nor the land valued, under the statutes of Indiana, the sheriff's deed was inoperative and void. And on this question the opinions of the judges were opposed; and, on motion of plaintiff's counsel, the point is certified to the Supreme Court, under the act of Congress.

The following are the acts of the State of Indiana which have relation to the question, certified as furnished by counsel:

N. W. Ter.—Act of 1795, subjecting real estate to execution in debt; adopted from the Pennsylvania code.

Section 6. Remedy on mortgages, to wit:

"Where default or defaults have been, or shall be, made or suffered by any mortgagor or mortgagors of any lands, tenements, or other hereditaments within this territory, or by his, her, or their heirs, executors, administrators, and assigns, of or in payment of the mortgage money, or performance of the condition or conditions which they, or any of them, should have paid or performed, or ought to pay or perform, in such manner and form, and according to the purport, tenor, and effect of the respective provisoes, conditions, or covenants, comprised in their deeds of mortgage, or defeasance, and at the days, times, and places in the same deeds respectively mentioned and contained; in every such case, it shall and may be lawful to, and for, the mortgagee or mortgagees, and him, her, or them, that grant the said deeds of defeasance, and his, her, and their heirs, executors, administrators, or assigns, at any time after the expiration of twelve months next ensuing the last day whereon the said mortgage money ought to be paid, or other conditions performed as aforesaid, to sue forth a writ or writs of scire facias, which the clerk of the court of common pleas, for the

county where the said mortgaged lands or hereditaments lie, is hereby empowered and required to make out and dispatch, directed to the proper officer, requiring him, by honest and lawful men of the neighborhood, to make known to the mortgagor or mortgagors, his, her, or their heirs, executors, or administrators, that he, or they, be and appear before the magistiates, judges, or justices of the said court or courts, to shew, if anything he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution for payment of the said mortgaged money with interest: or to satisfy the damages, which the plaintiff, in such scire facias, shall, upon the record, suggest for the breach or non-performance of the said conditions. And if the defendant in such scire facias appear, he, or she, may plead satisfaction or payment of part, or all, the mortgage money, or any other lawful plea, in avoidance of the deed or debt, as the case may require; but if the defendants in such scire facias will not appear on the day whereon the same writ shall be made returnable, then, if the case be such as damages only are to be recovered, an inquest shall be forthwith charged to inquire thereof; and the definitive judgment therein, as well as all other judgments to be given upon such scire facias, shall be entered, that the plaintiff in the scire facias shall have execution by levari facias, directed to the proper officer; by virtue whereof, the said mortgaged premises shall be taken in execution, and exposed to sale in manner aforesaid; and upon sale, conveyed to the buyer or buyers thereof, and the money or price of the same rendered to the mortgagee or creditor; but, for want of buyers, to be delivered to the mortgagee or creditor, in manner and form as is hereinabove directed concerning other lands and hereditaments, to be sold or delivered upon executions for other debts or damages. And when the said lands and hereditaments shall be so sold or delivered as aforesaid, the person or persons to whom they shall be so sold, or delivered, shall and may hold and enjoy the same, with their appurtenances, for such estate or estates as they were sold or delivered, clearly discharged and freed from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagors, their heirs, or assigns; and such sale shall be available in law; and the respective vendees, mortgagees, or creditors, their heirs, and assigns, shall hold and enjoy the same, freed and discharged as aforesaid. But before such sales be made, notice shall be given in writing, in manner and form as is herein above directed, concerning the sales of lands upon executions; any law or usage to the contrary notwithstanding.

Indiana Ter.—Act of 1807, rev'd code, ch. 12, §4, p. 59, 60, same as above precisely.

Statutes of Indiana, revised code of 1818, chapter 22, sec. 7.—"An act subjecting real and personal estate to execution, approved January 7, 1818."

When default or defaults have been, or shall be made, or suffered by any mortgager or mortgagers, of lands, tenements, or hereditaments, within this State, or by his, her, or their heirs, executors, administrators, or assigns, of or in payment of the mortgage money, or performance of the condition or conditions, which they, or any of them, should have paid or performed, or ought to pay or perform, in such manner and form, and according to the purport, tenor, and effect of the respective provisions, conditions, or covenants comprised in their deeds of mortgage or defeasance, and at the days, times, and places in the same deeds, respectively mentioned and contained in any purchase, it shall and may be lawful to and for the mortgagee or mortgagees, and him, her, or them, that hold the said deeds of defeasance, and his, her, or their heirs, executors, and assigns, any time after the expiration of twelve months next ensuing the last day whereon the said mortgage money ought to be paid, or other conditions performed as aforesaid, to sue forth a writ or writs of scire facias, which the clerk of the circuit court for the county, where the said mortgaged lands or hereditaments lie, is hereby empowered and required to make out, directed to the proper officer, requiring him, by honest and lawful men of the neighborhood, to make known to the mortgager or mortgagers, his, her, or their heirs, executors, or administrators, that he, or they, be and appear before the judges of the said court to show, if any thing he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution for payment of the said mortgage money, with interest; or to satisfy the damages which such plaintiff, or plaintiffs, in such scire facias, shall, upon the record, suggest for the breach and performance of the said conditions; and if the defendant or defendants in such scire facias appear, he, she, or they may plead satisfaction or payment of part or all the mortgage money, or any other such lawful plea in evidence of the deed or debt, as the case may require; but if the defendant in such scire facias does not appear on the day whereon the writ shall be made returnable, then, if the case be such that damages only are to be recovered, an inquest shall be forthwith charged to inquire thereof, and the definitive judgment therein, as well as all other judgments to be given upon such scire facias, shall be entered, and the plaintiff in the scire facias shall have execution by levari facias, directed to the proper officer, by virtue whereof the said mortgaged premises shall be taken in execution, and exposed to sale, in manner aforesaid; and upon sale, conveyed to the buyer or buyers thereof, and the money or price of the same, rendered to the mortgager or creditor, but for want of buyers, to be delivered to the mortgagee or creditor, according to the tenor and effect of said

mortgage; and when the said lands and hereditaments shall be sold or delivered as aforesaid, the person or persons to whom they shall be sold or delivered, shall and may hold and enjoy the same, with their appurtenances; and such estate or estates shall be discharged and freed from all equity and benefit of redemption, and all other circumstances made or suffered by the mortgagers, their heirs, or assigns; and such sale shall be available in law, and the respective vendees, mortgagees, or creditors, their heirs, and assigns, shall hold and enjoy the same, freed and discharged as aforesaid; but before such sale shall be made, notice shall be given in writing, in manner and form as is hereinabove directed concerning the sales of land upon execution; any law or usage to the contrary notwithstanding.

An act, entitled an act subjecting real and person[al] estate to execution, approved January 30, 1824.—Rev'd laws of Indiana, 1824, ch. 40, sec. 3 and 18, page 189, &c., to wit:

Sec. 3. When execution shall hereafter issue on any judgment, real and personal estate shall sell for the best price it will bring; provided, however, the sheriff or other officer shall, in all cases mentioned in this section, before he offer the fee simple of any real estate for sale, offer the rents and profits of the same for sale for seven years; and if the rents and profits shall sell for a sufficiency to satisfy such execution, the sheriff or other officer shall make the purchaser a deed, and put him in possession accordingly; but if such rents and profits will not sell to satisfy the same, then the fee simple shall be offered for sale, and the sheriff or other officer shall make a deed to the purchaser accordingly.

Sec. 18, page 194. When default or defaults shall be made or suffered by any mortgager or mortgagers of lands, tenements, or hereditaments, or by his, her, or their heirs, executors, administrators, and assigns, of or in the payment of the mortgage money, or performance of the condition or conditions, which they, or any of them, should have paid or performed, or ought to pay or perform, in such manner and form, and according to the purport, tenor, and effect of the respective provisions, conditions, or covenants, comprised in the deeds of mortgage or defeasance, and at the days, time, and places in the same deeds respectively mentioned, and contained in any purchase, it shall and may be lawful to and for the mortgagee or mortgagees, and him, her, or them, that hold the said deed of defeasance, and his, her, or their heirs, executors, administrators or assigns, any time after the expiration of twelve months next ensuing the last day whereon the said mortgage money ought to be paid, or other conditions performed as aforesaid, to file his, her, or their bill in the proper circuit court, according to the course of the common law, praying said court to foreclose the equity of redemption to said mortgaged premises; and the said circuit court shall, having jurisdiction thereof, make such equitable decree between the parties, as shall be right and just; and the said

mortgaged premises, if ordered to be sold by said court, shall sell for the amount of the debt or damages at least, which the said mortgage deed was intended to secure; and the overplus, if any, shall be returned to the mortgager; and if the said mortgaged premises should not, on being exposed, sell for a sufficient sum to pay the said debt or damages, interest and costs, then the said mortga-

4 Sect., acts 1795, N. W. Ter. It shall and may be lawful for the sheriff, or other officer, by a writ of levari facias, to seize and take all other lands, tenements, and hereditaments in execution, and thereupon, with all convenient speed, either with or without any writ of venditioni exponas, to make public sale thereof for the most they will yield, and pay the price or value of the same to the party towards satisfaction of his debt, damages, and cost. But before any such sale be made, the sheriff, or other officer, shall cause so many writings to be made upon parchment or good paper, as the debtor or defendants shall reasonably desire or request, or so many, without such request, as may be sufficient to signify and give notice of such sales or vendues, of the day and hour when, and the place where, the same will be, and what lands or tenements are to be so sold, and where they lie; which notice shall be given to the defendant, and the said parchment or papers fixed by the sheriff or other officers, in the most public places of the county, at least ten days before sale. And upon such sale, the sheriff, or other officer, shall make return thereof, endorsed or annexed to the said levari facias, and give the buyer a deed, duly executed and acknowledged in court, for what is sold. But in case the said lands and hereditaments, so to be exposed, cannot be sold, then the officer shall make return upon the writ, that he exposed such lands or tenements to sale, and the same remained in his hands unsold, for want of buyers; which return shall not make the officer liable to answer the debt or damages contained in such writ; but the writ of levari facias shall forthwith be awarded, and directed to the proper officer, commanding him to deliver to the party such part or parts of those lands, tenements, and hereditaments, as shall satisfy his debt, damages, and interest, from the time of the judgment given, with costs of suit, according to the valuation of twelve men; to hold to him as his free tenement, in satisfaction of his debt, damages, and cost, or so much thereof as those lands, by the valuation thereof as aforesaid, shall amount unto; and if it fall short, the party may, afterwards, have execution for the residue against the defendant's body, lands or goods, as the laws of this territory shall direct and appoint from time to time concerning other executions. All which said lands, tenements, hereditaments, and premises, so as aforesaid to be sold or delivered by the sheriff, or other officer, aforesaid, with all their appurtenances, shall or may be quietly and peaceably held and enjoyed by the person or persons, or bodies politic, to whom the same shall be sold or delivered, and by his and their heirs, successors, and assigns, as fully and amply for such estate and estates, and under such rents and services, as he, or they, for whose debt or duty the same shall be sold or delivered, might, could, or ought to do, at, or before, the taking thereof in execution.

ged premises shall be delivered to the mortgagee, in full satisfaction thereof, costs excepted; and when the said lands and hereditaments shall be sold or delivered as aforesaid, the person or persons to whom they shall be sold or delivered, shall and may hold and enjoy the same, with their appurtenances; and such estate or estates shall be discharged and free from all equity and benefit of redemption, and all other incumbrances made or suffered by the mortgagees, their heirs, or assigns; and such sale shall be available in law, and the respective vendees, mortgagees, and creditors, their heirs and assigns, shall hold and enjoy the same free and discharged as aforesaid; but before such sale shall be made, notice shall be given in writing, in manner and form as is herein above directed, concerning the sale of lands upon execution; any law or usage to the contrary notwithstanding.

Revised laws of 1831, *to wit:*

An act, entitled an act subjecting real and personal estate to execution, approved Feb'ry 4, 1831.—Ch. 36, secs. 3 and 25; pages 235 and 244.

Sec. 3. That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have first been offered for sale at public auction and outcry; and if such rents and profits will bring a sum sufficient to satisfy the execution or executions levied thereon, the sheriff, or other officer, selling the same, shall make to the purchaser thereof a deed conveying to such purchaser a term of seven years in and to such real estate; and moreover forthwith deliver immediate and actual possession thereof; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee simple, or other estate, of the execution defendant or defendants, shall be sold, and a deed, conveying the same to the purchaser thereof, shall be executed by the officer selling the same.

Sec. 18. That when default or defaults shall be made or suffered by any mortgager or mortgagers of lands, tenements, or hereditaments, or by his, her, or their heirs, devisees, executors, administrators, or assigns, of or in the payment of the mortgage money, or the performance of the condition or conditions which they, or any of them, should have paid or performed, or ought to pay or perform, in such manner and form, and according to the tenor, purport, and effect of the respective provisions, conditions, or covenants, comprised in the deeds of mortgage or defeasance, and at the days, times, and places in the same deeds respectively mentioned and contained in any purchase, it shall and may be lawful to and for the mortgagee or mortgagees, and him, her, or them, who may hold the deed of defeasance, and his, her, or their heirs,

executors, administrators, or assigns, at any time after the expiration of the last day whereon the said mortgage money ought to be paid, or other conditions performed as aforesaid, to file his, her, or their bill in the proper circuit court, according to the course of the common law, praying such court to foreclose the equity of redemption of the mortgager or mortgagers to such mortgaged premises; and the said court, having jurisdiction thereof, shall make such equitable decree in the premises between the parties as may be right and just; and the said mortgaged premises, if ordered to be sold by said court, shall be sold as other lands are sold on execution to the highest bidder at public vendue; and the sheriff, selling the same, shall make a proper deed of conveyance to the purchaser or purchasers thereof, as in cases of other lands when sold on execution; and when such lands, tenements, or hereditaments shall be sold as aforesaid, the person or persons to whom the same may be sold, shall and may hold, and enjoy the same with their appurtenances, and such estate or estates shall be discharged from all equity or benefit of redemption, and all other incumbrances made or suffered by the mortgager or mortgagers, his, her, or their heirs, or assigns; and such sales shall be available in law, and the respective vendees, mortgagees, and creditors, their heirs and assigns, shall hold and enjoy the same free and discharged as aforesaid; but before such sale be made, notice thereof shall be given in manner and form as is herein above prescribed, concerning the sale of lands upon execution.

The acts of 1838, subjecting real and personal estate to execution.—Ch. 39, sec. 25, page 284, same as 1831 precisely; also, sec. 30, page 286.

The first juridical day of the first term in the year of each circuit court, and the ninetieth day thereafter, or if the same shall fall on Sunday, then the Monday next following, also the first juridical day of the last term, in the year of such circuit court, and the ninetieth day thereafter, or if the same should happen on Sunday, then the Monday next following, shall be return days for all writs of executions which may issue from such court.

Laws of 1841, chapter 17, sec. 1, pages 101, 102, to wit: an act fixing the times of holding courts in the 8th judicial district, (circuit.)—Approved, February 1st, 1841.

Sec. 1. Be it enacted by the General Assembly of the State of Indiana, that the courts in the eighth judicial district, in the State of Indiana, be holden as follows: in the county of Cass on the fourth Monday in February and August, and hold its session for two weeks; in the county of Miami, on the Monday succeeding the courts in Cass; in the county of Wabash, on the Monday succeeding the courts in Miami; in the county of Whitly, on the Monday succeeding the courts in the county of Wabash; in the

county of Huntington, on the Monday succeeding the courts in the county of Whitley; in the county of Allen, on the Monday succeeding the courts in the county of Huntington, and hold its session for two weeks; in the county of De Kalb, on the Monday succeeding the courts in the county of Allen; in the county of Steuben, on the Monday succeeding the courts in the county of De Kalb; in the county of La Grange, on the Monday succeeding the courts in the county of Steuben; in the county of Noble, on the Monday succeeding the courts in the county of La Grange.

Laws of 1841, to wit: an act supplemental to an act subjecting real and personal property to execution.—Approved, Feb'y 4, 1831; approved, Feb'y 13, 1841.

Ch. 49, sec. 1. Be it enacted by the General Assembly of the State of Indiana, that whenever any land or other real estate shall have been, or may be sold, on execution under any judgment or decree, it shall be lawful for the owner of such real estate, his heirs, executors, or administrators, to redeem the same at any time within twelve months from the day of sale, by paying into the clerk's office, from which such execution may have issued, the full amount of the purchase money for which such real estate was sold on said execution, with interest thereon at the rate of twelve and one half per cent. per year.

Sec. 2. That whenever such sale may be made as aforesaid, all junior incumbrances on the land so sold by judgment, mortgage, or other deed or conveyance bona fide made before the day of sale, shall have the right to redeem any real estate sold as aforesaid, in the same manner the execution defendant might have redeemed at any time within thirty days after the expiration of said twelve months.

Sec. 3. That whenever any judgment debtor is not able or neglects to take the stay as provided in the laws now in force, his, her, or their property shall be sold on the same credit for which he might have taken the stay; and in such case the officer making the sale shall take bond with security from the purchaser, which shall have the effect of a judgment, and execution may issue upon the same as in other cases, and no stay of execution shall be allowed thereon; said bonds, taken as aforesaid, shall be filed by the officer taking the same, with the clerk or justice issuing the execution, at the same time of returning the execution; provided, that the provisions of this act shall not extend to any bank or savings institution.

Sec. 4. That all real estate shall be sold or offered for sale at the door of the court house, or the place where courts are holden in the county where the same may be situate; and provided, that no property, either real or personal, shall be sold unless there shall be three or more bidders present at such sale, and have an opportunity of bidding for the same.